United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2679

To be argued by
RICHARD J. HOSKINS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2679

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR VANCIER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD J. HOSKINS,
LAWRENCE S. FELD,
Assistant United States Attorneys, of Counsel.

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Preliminary Statement

Victor Vancier appeals from a judgment adjudicating him a juvenile delinquent entered on December 6, 1974, after a one-day bench trial before the Honorable Inzer B. Wyatt, United States District Judge.

Information 74 Cr. 813, filed on August 16, 1974, charged Vancier in one count with committing acts of juvenile delinquency in violation of Title 18, United States Code, Sections 5031 through 5037, specifically by attempting to damage and aiding and abetting an attempt to damage an automobile belonging to a Soviet official assigned to the Permanent Mission of the Soviet Union to the United Nations, in violation of Title 18, United States Code, Sections 970 and 2. On August 16, 1974 Vancier entered a plea of not guilty and filed with the District Court his

consent to be tried as a juvenile under the then-effective provisions of Title 18, United States Code, Sections 5032 and 5033.*

On November 11, 1974, the Government filed the certification of the United States Attorney that the "juvenile court or other appropriate court of the State of New York does not have jurisdiction over Victor Vancier" with respect to the acts of delinquency charged in the Information.

Trial commenced on November 11, 1974 and concluded the same day when Judge Wyatt adjudicated Vancier a juvenile delinquent.

On December 6, 1974, Judge Wyatt committed Vancier to the custody of the Attorney General for two months as a juvenile delinquent pursuant to Title 18, United States Code, Section 5037(b), as amended by the provisions of the statute which became effective on September 7, 1974.

Statement of Facts

The Government's Case

At approximately 4:30 a.m. on May 24, 1974, Vancier and another youth, Stanley Spirn,** were sitting in a

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* The Juvenile Justice and Delinquency Act of 1974, Pub. L. No. 93-415, contained a number of amendments to the juvenile delinquency provisions of Title 18, including the requirement of certification by the Attorney General which is the issue on this appeal. These amendments became effective on September 7, 1974, after the filing of the Information in this case but before the trial. Without conceding the necessary applicability of the amendments to the trial below, the Government proceeded to file the certification called for by the Act.

** Spirn was separately tried and convicted of violating 18 U.S.C. §§ 970 and 2. On February 27, 1975 this Court affirmed Spirn's conviction from the bench. *United States* v. *Spirn*, Dkt. No. 74-2490.

parked Pontiac facing south on the east side of Lexington Avenue between 67th and 68th Streets in Manhattan. (Tr. 10-12, 59-61).* The Permanent Mission of the Soviet Union to the United Nations is less than a block away on 67th Street between Third and Lexington Avenues. (Tr. 18).

Vancier got out of the car, walked to the corner of 68th Street and Lexington, looked in several directions, and returned to the car. (Tr. 13-14, 61). He then removed a large green can from the Pontiac, walked up to a Plymouth Duster parked directly in front of the Pontiac, and started pouring gasoline from the can onto the automobile. (Tr. 14-17, 62, 74-77, 97). The Plymouth bore diplomatic license plates number DPL 595, which were registered to Vladimir Yezhov, an official attached to the Soviet Mission to the United Nations. (Tr. 16, 40-48).

Vancier and Spirn were arrested at the scene, the latter in possession of matches. (Tr. 64). Vancier was charged in a complaint, filed in New York City Criminal Court, with criminal mischief in the fourth degree, a Class A misdemeanor. N.Y. Penal Law § 145.00. On May 24, 1974, Vancier also was charged in a Federal complaint with committing acts of juvenile delinquency, 18 U.S.C. §§ 5031-5037, based on the underlying charge of attempting to damage the property of a foreign diplomat, 18 U.S.C. §§ 970, 2. On August 20, 1974, the New York City Criminal Court, informed of the Federal complaint, adjourned the State complaint in contemplation of dismissal. N.Y. Criminal Procedure Law § 170.55 (11A McKinney 1971). The complaint was automatically dismissed in February, 1975.

At trial, the Government also proved as a prior similar act Vancier's harassment of a Russian diplomat and his wife and two children in December, 1973 as they attempted

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* "Tr." refers to the trial transcript; "App." refers to appellant's appendix; "Br." refers to appellant's brief.

to enter their automobile bearing diplomatic plates parked near the Soviet Mission. Accompanied by another youth, Vancier began speaking in Russian to the diplomat, and then he or the other youth spat on the Soviet official. The two youths then shoved the diplomat back and forth between them, and they were arrested. The incident occurred during a protest demonstration. (Tr. 82-91).

The Defense Case

Vancier offered no evidence.

ARGUMENT

The trial court properly denied Vancier's motion for a hearing as to whether any appropriate court of the State of New York other than juvenile court had jurisdiction.

Title 18, United States Code, Section 5032, effective September 7, 1974, provides in pertinent part:

> "A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles." *

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* The authority to so certify on behalf of the Attorney General has been delegated to the appropriate United States Attorney. 28 C.F.R. O.57, 39 Fed. Reg. 37771 (1974); Memorandum No. 801 of the Assistant Attorney General, Criminal Division, October 30, 1974.

On November 11, 1974, the United States Attorney for the Southern District of New York, "after due investigation", certified to the District Court:

> "that a juvenile court or other appropriate court of the State of New York does not have jurisdiction over Victor Vancier with respect to the alleged act of juvenile delinquency charged in" the Information.*

Vancier and the Government are in complete agreement that New York State's juvenile court, the Family Court, did not have jurisdiction because Vancier was over fifteen years of age.** New York Family Court Act § 712 (29A McKinney 1963). The only disagreement, and the sole issue on this appeal, is whether the Juvenile Justice and Delinquency Act gives the District Court or the Attorney General the exclusive responsibility to decide whether there was another "appropriate" State court with jurisdiction.

The Government submits that the statute is quite clear: it speaks not of a hearing followed by a ruling of the court, but of an investigation followed by a certification of the Attorney General. As Judge Wyatt correctly held, at least where everyone agrees that the State juvenile court lacks jurisdiction, the responsibility to weigh whether another "appropriate" State court has jurisdiction over a Federally-arrested juvenile squarely rests on the Government, not the court.

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* In his brief, Vancier characterizes the Government's certification as being that New York State lacks adequate programs and services for juveniles. (*See, e.g.*, Br. at 8, 14). In fact, the certification is limited to an attestation that the State juvenile court has no jurisdiction, nor does any other "appropriate" court.

** Vancier was seventeen years old at the time of the offense (Tr. 19).

Because the new juvenile justice provisions are only a few months old, there are no cases directly on point. However, there are compelling analogies supporting the Government's position.

In *United States* v. *Carter*, 493 F.2d 704 (2d Cir. 1974), this Court granted mandamus and directed the District Court to order the deposition of an important Government witness who, because of illness, had become unable to testify at trial. The Government had submitted to the District Court, pursuant to 18 U.S.C. § 3503(a), the certification of the Attorney General that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity". The District Court refused to order the deposition on the sole ground that there was no basis in fact for the certification. Reaffirming its holding in *United States* v. *Singleton*, 460 F.2d 1148, 1153-55 (2d Cir. 1972), this Court held that the determination of whether the case involved organized criminal activity belonged solely to the Attorney General, not the court:

> "Congress did not intend that the organized criminal activity certification be subject to judicial examination. The trial court is not to make a *de novo* determination. The certification used here was in the form upheld in *Singleton*, and under *Singleton*, is vulnerable only if the defendant is able to show that the Government acted in bad faith." 493 F.2d at 707.

The Court noted other instances in which Congress has vested "exclusive jurisdiction in the executive branch of Government to make determinations relating to law enforcement matters," including the United States Attorney's certification authority under 18 U.S.C. § 3731 that an interlocutory appeal is not taken for delay and that evidence suppressed by the trial court is substantial proof of the charges against the defendant, and similar authority conferred by the immunity statute, discussed below. *Id.* at 708 n. 3.

Title 18, United States Code, Section 6003, provides for the issuance by the District Court of orders granting immunity and requiring the testimony of a witness upon the request of the United States Attorney and his certification that "the testimony or other information from such individual may be necessary to the public interest", and that the individual has refused or is likely to refuse to testify on the basis of his privilege against self-incrimination. 18 U.S.C. § 6003(b). The courts have universally held that once the United States Attorney has made the request and provided the required certifications, the order must be granted. The court has neither discretion to deny the application on the basis that the United States Attorney's determinations were wrong nor the power to order a hearing concerning that determination. *United States* v. *Carter, supra,* 493 F.2d at 708 n. 3; *In Re Lochiatto,* 497 F.2d 803, 804 n. 2 (1st Cir. 1974); *In Re Grand Jury Investigation,* 486 F.2d 1013, 1016 (3d Cir. 1973); *In Re Kilgo,* 484 F.2d 1215, 1218-19 (4th Cir. 1973); *In Re Tierney,* 465 F.2d 806, 813 (5th Cir. 1972), *cert. denied,* 410 U.S. 914 (1973); *Ullman* v. *United States,* 350 U.S. 422, 431-34 (1956).

Finally, the juvenile delinquency provisions of Title 18 in effect prior to September 7, 1974 specified that in proceedings against a juvenile, the latter must be treated as a juvenile delinquent and not as an adult offender, "unless the Attorney General, in his discretion, has expressly directed otherwise". 18 U.S.C. § 5032 (old statute). The rule that has been long observed in this Circuit is that the District Court cannot go behind the Attorney General's direction, nor can it inquire by a hearing into the basis for that direction, at least absent a showing of bad faith or improper basis.

> "[T]he ultimate decision as to whether the Government will forego prosecution under the general crimi-

> nal statutes rests in the sole discretion of the Attorney General . . . The Court is without power to interfere with or overrule the exercise of this discretion." *United States* v. *Verra*, 203 F. Supp. 87, 91 (S.D.N.Y. 1962) (Weinfeld, *J.*).

Accord, *Nieves* v. *United States*, 280 F. Supp. 994, 1002-03 (S.D.N.Y. 1968); *Ramirez* v. *United States*, 238 F. Supp. 763, 764 (S.D.N.Y. 1965).

On this appeal there is no claim by Vancier that the Government's certification was made in bad faith, in contravention of the statute, or otherwise improperly. He simply disagrees with the Government's determination and argues that the trial court should have ordered a hearing to determine whether New York City Criminal Court was a more appropriate forum than Federal Court. Most of his brief is devoted to presenting reasons why the New York State Criminal Court with its youthful offender treatment would be more "appropriate" than Federal Court with its juvenile delinquency treatment. Vancier does not even address the critical fact that the statute expressly gives the Attorney General rather than the defendant or even the court the exclusive right to weigh the reasons and make the determination.*

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* As primary support for his contention that the trial court should have inquired into the relative merits of State and Federal systems, Vancier points to the transfer provisions of amended 18 U.S.C. § 5032 which require a hearing, and quotes a paragraph from that section setting forth factors which the court must consider, after hearing, in deciding whether to make the requested transfer. (Br. 11-12) Unfortunately for that argument, these provisions are for a transfer from juvenile delinquency status in Federal court to adult criminal status in Federal court, and have nothing whatever to do with State as against Federal jurisdiction. With respect to the latter, the statute is pointedly silent as to a hearing.

Although the statute requires no showing by the Attorney General as to the reasons underlying his determination, in this case the Government made such a showing in the letter of Assistant United States Attorney Jo Ann Harris to Judge Wyatt dated November 5, 1974 (App. A-6 through A-15). As the letter makes clear, the United States Attorney's decision in favor of Federal juvenile deliquency treatment recognized that such treatment clothed the defendant with a number of highly significant protections he would not have enjoyed as a youthful offender under the State system. Federal juvenile delinquency proceedings are wholly non-criminal in nature, initiated upon a non-criminal accusatory instrument, and with the non-criminal adjudication of juvenile delinquency replacing a criminal conviction. (18 U.S.C. §§5031, 5032, 5037). There are separate adjudicatory and dispositional proceedings, with a number of dispositional alternatives. (18 U.S.C. § 5037). The juvenile's right to speedy trial is protected (18 U.S.C. §§ 5034, 5036) and there are special provisions to safeguard the secrecy of the proceedings, records, and disposition of the charges. (18 U.S.C. §§ 5038, 5032).

Under New York State youthful offender treatment, N.Y. Criminal Procedure Law §§ 720.10-720.35 (11A McKinney 1971), the proceedings are criminal in nature, initiated by a criminal indictment or information, and resulting, if guilt is proved, in a criminal conviction. (N.Y.C.P.L. § 720.15). Indeed, except that upon defendant's motion, the accusatory instrument must be sealed and the proceedings may—in the court's discretion—be conducted in private, youthful offender procedure is entirely the same as adult criminal treatment.* It is only on the

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* The provision in N.Y.C.P.L. § 720.15(3) that the court must give the jury "stringent instructions not to reveal to anyone the identity of the defendant the crime charged against him, or the crime of which he may be convicted", to which Vancier points so proudly (Br. at 10), was repealed effective September 1, 1972.

day of sentencing, after the youth has been convicted, that the court may vacate the criminal conviction and substitute a youthful offender finding. N.Y.C.P.L. § 720.20.

In addition to the non-criminal nature of Federal treatment for seventeen-year olds such as Vancier, there are other protective features of Federal juvenile treatment not present in the State criminal-youthful offender system:

> (1) In the Federal system, "[a] juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community-based facility located in or near his home community". 18 U.S.C. § 5035.
>
> (2) A juvenile in the Federal system who is incarcerated must be brought to trial within thirty days; otherwise, the information must be dismissed with prejudice, except in "extraordinary circumstances". "Delays attributable solely to court calendar congestion" may not be excluded from the thirty-day pre-trial period. 18 U.S.C. § 5036.
>
> (3) Without the written consent of the judge, neither the juvenile's fingerprints nor photograph may be taken by the Government. 18 U.S.C. § 5038 (d)(1).
>
> (4) Both during detention awaiting trial and when incarcerated pursuant to sentence, no juvenile "may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges". 18 U.S.C. §§ 5039, 5035. Furthermore:
>
> "[e]very juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation,

> counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment." 18 U.S.C. § 5039.

None of these protective elements of Federal juvenile treatment are present in the New York State statutory scheme for youthful offenders.

The Government submits that the decision as to the "appropriateness" of New York State non-juvenile jurisdiction over Vancier was one solely for the Attorney General, and that that decision was properly made here.*

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* Vancier's "double punishment" argument (Br. 12-13) is frivolous. He was never placed in jeopardy on the State charges, which were adjourned in contemplation of automatic dismissal, and his conduct was clearly subject to concurrent State and Federal jurisdiction. *Abbate* v. *United States*, 359 U.S. 187 (1959); *cf. Bartkus* v. *Illinois*, 359 U.S. 121 (1959). Besides, the claim was not raised below and was thus waived. *United States* v. *Wilson*, 32 U.S. 150 (1833); *United States* v. *Scott*, 464 F.2d 832, 833 (D.C. Cir. 1972); *cf., United States* v. *Friedland*, 391 F.2d 378, 381-82 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1971).

CONCLUSION

The judgment adjudicating Vancier a juvenile delinquent should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Richard J. Hoskins being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 2d day of April, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Robert Leighton, Esq.
15 Park Row
New York, NY 10038

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard J. Hoskins

Sworn to before me this
2nd day of April, 1975

Richard Wile

RICHARD WILE
Notary Public, State of New York
No. 31-0670850
Qualified in New York County
Commission Expires March 30, 19[illegible]